FICE FRANSINA NENOBAIS v. LEE HEE CHOOI

HIGH COURT MALAYA, SHAH ALAM
AZIZAH NAWAWI J
[CIVIL APPEAL NO: BA-16-34-08-2018]
28 MAY 2020

LABOUR LAW: *Jurisdiction – Labour Court – Claim for non-payment of salary by employee – Labour Court decided it had no jurisdiction as employee did not possess work permit – Whether employee fell within s. 2 of Employment Act 1955 – Whether pre-mature for Labour Court to consider issue of work permit – Whether claim ought to have been heard on merits – Employment (Restriction) Act 1968, s. 5(1)(a)*

The appellant claimed against the respondent for non-payment of salary from 2012 to 2017 in the sum of RM30,265.32. The Labour Officer directed the parties to submit on a preliminary issue under s. 5(1)(a) of the Employment (Restriction) Act 1968 ('ERA'). Having read the submissions by both parties, the Labour Court dismissed the appellant's claim holding that it did not have the jurisdiction to hear the claim as the appellant did not possess a work permit. Hence, the appellant's appeal. The issue for the court's determination was whether the appellant was an employee and whether the respondent was an employer within the definition of s. 2 of the Employment Act 1955 ('EA').

Held (allowing appeal; remitting matter back to Labour Court):

(1) The jurisdiction of the Labour Court to make an inquiry into the appellant's complaint is provided by s. 69 of the EA which enables the Labour Court to make an inquiry between 'an employee and his employer in respect of wages or any other payments in cash due to such employee'. Pursuant to s. 2 of the EA, the appellant fell within the definition of an employee, being paid wages below RM2,000 by the respondent. There was an oral agreement between them where the respondent had employed the appellant, not just as 'pembantu rumah', but also as 'pembantu kedai' with a salary of RM600 per month. As such the appellant's complaint fell within s. 69 of the EA and it was the duty of the Labour Court to make the due inquiry under s. 70 of the EA. (paras 9, 15 & 16)

(2) This was a case of clear exploitation of employees, whereby the appellant was employed, not just as a 'pembantu rumah', but also as a 'pembantu kedai'. She was not paid her full salary for almost five years and finally when she filed a case in the Labour Office for the non-payment of salary, her claim was not even heard and was dismissed on the ground that she did not have a work permit. The respondent, as the employer, was under the duty to obtain the work permit for the

A appellant. The respondent could not be allowed to profit from the appellant's free labour and abuse s. 5(1)(a) of the ERA to defeat the appellant's claim for unpaid wages. (para 26)

(3) It was pre-mature for the Labour Court to only consider the valid permit issue without ascertaining whether there was any employment
B relationship entered between the appellant and the respondent. The Labour Officer had clearly abandoned his jurisdiction to hear the merits of the appellant's claim. As to whether the respondent would want to invoke s. 5(1)(a) of the ERA was a matter to be decided at the end of the inquiry and it was not for the Labour Court to raise it as a
C preliminary issue on its own. The matter was thus reverted to the Labour Court to be heard on merits. (paras 24, 25 & 27)

Case(s) referred to:
Lee Seng Kee v. Sukatno; Ong Thean Soo (Third Party) [2008] 1 LNS 226 HC ***(dist)***

D **Legislation referred to:**
Employment Act 1955, ss. 2, 69, 70
Employment (Restriction) Act 1968, s. 5(1)(a), (3)

For the appellant - SP Devi; M/s P Kuppusamy & Co
For the respondent - K Renuka Devi & Thneu Wan Jing; M/s V Samy Renu & Co

E *Reported by S Barathi*

JUDGMENT

Azizah Nawawi J:

F **Appeal**

[1] This is an appeal filed by the appellant against the order of the Labour Court dated 14 August 2018 which had dismissed her claim for unpaid wages premised on a preliminary issue. The Labour Court held that it does not have the jurisdiction to hear the claim as the appellant does not possess a work
G permit.

[2] Having considered the appeal and the submissions of both parties, this court has allowed the appeal and remitted the claim back to the Labour Court to hear and determine the claim on its merits.

H **The Salient Facts**

[3] The appellant had lodged a complaint at the Port Klang Labour Office claiming for non-payment of salary from 2012 to 2017 from the respondent in the sum of RM30,265.32.

I **[4]** Pursuant to the appellant's complaint, the labour office had issued the summons to the respondent.

[5] Both parties filed their necessary cause papers and the matter was set down for trial on 19 July 2018. Before the commencement of the trial, the presiding labour officer raised an issue on s. 5(1)(a) of the Employment (Restriction) Act 1968 ("Act 796") and directed the parties to file their respective submissions. The issue raised by the Labour Court was whether the Labour Court has the jurisdiction to hear the claim as the appellant does not possess a work permit.

[6] Having read the submissions of both parties, the Labour Court had dismissed the appellant's claim by concluding that the Labour Court has no jurisdiction to hear the case since the appellant has no work permit.

[7] Being dissatisfied with the order of the Port Klang Labour Office, the appellant has appealed to this court.

Findings Of The Court

[8] In the 'alasan penghakiman', the Labour Court held as follows:

> Secara hakikinya Mahkamah Buruh tidak berupaya untuk melangkaui batas autoriti dengan secara jelas status seorang itu adalah pekerja yang tidak mempunyai status kerja yang sah. Oleh yang demikian adalah di luar bidangkuasa autoritinya untuk menafikan undang-undang imigresen.

[9] The Labour Court has committed an error of law in making a finding that it has no jurisdiction to hear matters involving an employee who does not possess a valid working permit. The jurisdiction of the Labour Court to make an inquiry into the appellant's complaint is provided by s. 69 of the Employment Act 1955 (Revised 1981) ("Act 265"). Section 69 of Act 265 enables the Labour Court to make an inquiry between "an employee and his employer in respect of wages or any other payments in cash due to such employee." The said provision reads:

> 69. Director General's power to inquire into complaints
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> (1)The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under-
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> (a) any term of the contract of service between such employee and his employer; ...

[10] In the present case, the complaint by the appellant is that she was employed by the respondent between 2012 to 2017 as a 'pembantu rumah' at the respondent's house and as a 'pembantu kedai' at the respondent's shop in Klang, Selangor. There was no written contract of employment between the parties and the appellant was staying at the respondent's house during this period. The appellant's complaint was for "tunggakan gaji" from 2012 to 2017 in the sum of RM30,265.32.

[11] The issue here is whether the appellant is an employee and whether the respondent is an employer within the definition of s. 2 of Act 265. An "employee" is defined in s. 2 of Act 265 as follows:

> **employee** means any person or class of persons:
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> (a) included in **any category in the First Schedule** to the extent specified therein; or
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> (b) in respect of whom the Minister makes an order under subsection (3) or section 2A; (emphasis added)

[12] The First Schedule reads as follows:

> FIRST SCHEDULE [Subsection 2(1)]
>
> Employee
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> 1. Any person, **irrespective of his occupation**, who has entered into **a contract of service with an employer** under which such person's **wages do not exceed two thousand ringgit a month** ... (emphasis added)

[13] An employer is defined as 'any person who has entered into a contract of service to employ any other person as an employee ...'.

[14] With regards to a contract of service, it is defined in s. 2 of Act 265 as follows:

> contract of service means any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as an employee and that other agrees to serve his employer as an employee and includes an apprenticeship contract;

[15] Therefore, premised on s. 2 of Act 265, I am of the considered opinion that the appellant falls within the definition of an employee who is being paid wages below RM2,000 by the respondent employer. As per the appellant's complaint, there was an oral agreement between them where the respondent had employed the appellant, not just as the "pembantu rumah', but also as the 'pembantu kedai' with a salary of RM600 per month.

[16] As such, the appellant's complaint falls within s. 69 of Act 265 and it is the duty of the Labour Court to make the due inquiry under s. 70 of Act 265. There is no issue that the Labour Court has the jurisdiction to look into the complaint of the appellant.

[17] However, instead of making the inquiry under s. 70 of Act 265, the Labour Court directed both parties to submit on a preliminary issue. At p. 4 of the alasan penghakiman, the Labour Court stated:

> lsu yang dibangitkan dalam kes ini **samaada pejabat Tenaga Kerja mempunyai autoriti untuk mendengar kes atau sebaliknya kerana**:
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> (a) Tiada permit kerja yang dibenarkan kepada Pengadu untuk bekerja di negara ini.

(b) Tiada perjanjian atau dokumentasi secara bertulis antara kedua pihak.

(c) Status Pengadu sama ada Pekerja Domestik atau Pekerja lndustri. (emphasis added)

[18] In its findings, the Labour Court had invoked s. 5 of Act 796, which reads as follows:

5. Restrictions of employment of non-citizens

(1) (a) No non-citizen referred to in the Schedule shall be employed in any business in Malaysia or accept employment in any business in Malaysia unless there has been issued in respect of such non-citizen a valid employment permit.

(b) No person shall employ in Malaysia any non-citizen referred to in the Schedule unless there has been issued in respect of that non-citizen a valid employment permit.

(2) Subsection (1) shall have effect notwithstanding any other written law or any term or condition of any contract or agreement.

(3) For the purposes of this section, any person found performing any act normally performed by an employee in any place of employment shall be deemed to have been employed under a contract of service by the employer of that place of employment.

[19] Applying s. 5(1)(a) of Act 796, the Labour Court then made the following conclusion:

Dari fakta-fakta yang dikemukakan secara konklusinya dapat dirumuskan bahawa pengadu adalah seorang pekerja yang tidak mempunyai permit kerja yang sah, oleh yang demikian segala transaksi yang dijalankan olehnya adalah tidak sah. Akibat dari perkara tersebut maka gugurlah haknya untuk membuat sebarang tuntutan terhadap Defendan. Adalah tidak wajar bagi Makamah Buruh untuk mendengar kes ini kerana autoritinya adalah terhad, maka seseorang itu adalah tidak harus memaksa pejabat ini untuk melampaui batas demi untuk memenuhi kehendak atau tuntutan seorang itu.

[20] The findings of the Labour Court was supported by the respondent, who relied on the case of *Lee Seng Kee v. Sukatno; Ong Thean Soo (Third Party)* [2008] 1 LNS 226; [2008] 4 MLJ 716, where the High Court held as follows:

[118]. If the plaintiff has no legal status to remain in this country and is considered to be an illegal immigrant or an illegal worker, surely he cannot then claim to be entitled to loss of earnings which was derived from illegal earnings or as an illegal worker. In the instant case, the defence had produced sufficient evidence that the plaintiff is an illegal immigrant and his income was gained through illegal earnings. It is not then open to this court to strain the Immigration laws and introduce an arbitrary right to accommodate or entertain the plaintiff's claim where the plaintiff had glaringly contravened the express provision of the Immigration laws and

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> where criminal proceedings is contemplated against him if he is caught. This court is of the considered view that to allow this infringement of an express statute provision, arguably tantamount to opening a 'new horizon' which if allowed can go on at infinitum and open to interpretation according to whims and fancies of individual presiding officer and this ought to be discouraged for the sake of certainty, finality and public policy.

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[21] I am of the considered opinion that *Lee Seng Kee*'s case (*supra*) is distinguishable as the finding on illegal earning was made after a full trial in an accident case. In the present case, the claim was determined on a preliminary issue.

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[22] In any event, I am of the considered opinion and I agree with the appellant that in arriving at the said conclusion, the Labour Court has failed to ascertain whether sub-s. 5(3) of Act 796 has been satisfied. Subsection 5(3) provides that where the appellant had worked as an employee at the respondent's place, then she is deemed to be employed by the respondent. Therefore, the Labour Court is seised with the jurisdiction to hear the claim.

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[23] In its finding, the Labour Court held that:

> Oleh kerana aktiviti itu telah 'illegal', maka status pengadu itu domesik atau industry tidak perlu disoalkan. Ia tetap tidak sah dan tidak layak untuk membuat sebarang tuntutan, maka secara rumusan Mahkamah Buruh Pejabat Tenaga Pelabuhan Klang tidak mempunyai autoriti untuk mendengar kes ini.

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[24] I am of the considered opinion that it is pre-mature for the Labour Court to only consider the valid permit issue without ascertaining whether there was any employment relationship entered between the appellant and the respondent. If there is no employment relationship between the appellant and the respondent, the case ends there and there is no necessity for the Labour Court to ascertain the issue of the employment permit.

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[25] Bearing in mind that the appellant is claiming for her unpaid wages, which is strenuously denied by the respondent, it is incumbent for the Labour Court to ascertain whether the appellant and the respondent had entered into a contract of service, whereby the respondent is the employer while the appellant being the employee. Once this is established, the Labour Court is then clothed with the jurisdiction to hear the inquiry under ss. 69 and 70 of Act 265. It is not for the Labour Court to decide on the issue of the legal permit and pronounced that he lacked the jurisdiction to inquire into the complaint. I am therefore of the considered opinion that the labour officer had clearly erred in law when he dismissed the appellant's claim just on the ground that she does not have work permit, without hearing the merits of the case. The labour officer had clearly abandoned his jurisdiction.

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[26] Added to that, as submitted by the appellant, this is a case of clear exploitation of employees, whereby the appellant was employed not just as a "pembantu rumah" but also as a "pembantu kedai". She was not paid her full salary for almost five years and finally when she filed a case in the labour office for the non-payment of salary, her claim was not even heard and was dismissed on the ground that she does not have a work permit. It must be emphasised here that the duty lies with the respondent, as the employer to obtain the work permit for the appellant. The respondent cannot be allowed to profit from the appellant's free labour and then went on to abuse sub-s. 5(1)(a) of Act 796 to defeat the appellant's claim for unpaid wages.

Conclusion

[27] Premised on the reasons enumerated above, I am of the considered opinion that the Labour Court had abandoned its jurisdiction to hear the merits of the appellant's claims. The Labour Court is seised with the jurisdiction to hear the appellant's claim. As to whether the respondent want to invoke the defence of s. 5(1)(a) of Act 796, despite having benefited from the appellant's hard labour, is a matter to be decided at the end of the inquiry. It is not for the Labour Court to raise it as a preliminary issue on its own. It is on this basis that I had allowed the appeal and revert the matter back to the Labour Court to be heard on the merits.